Supreme Court, U.S.
FILED
98 77 JUL 6 1998
No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD BREEDLOVE, *et al.*,
Petitioners,

v.

EARTHGRAINS BAKING COMPANIES, INC.,
D/B/A CAMPBELL TAGGART BAKING COMPANY, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED FOR REVIEW

Whether Section 5(a)(1)(A) of the Workers Adjustment Retraining Notification Act ("WARN"), 29 U.S.C. § 2104(a)(1)(A), which provides that an employer who orders a plant closing or mass layoff in violation of the sixty day notice requirement to workers is "liable to each aggrieved employee . . . for . . . back pay for each day of violation," entitles those employees to damages for each calendar day of the violation or for each work day.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Richard Breedlove and Nadine Tanner, on behalf of themselves and approximately 100 other similarly situated former workers of Earthgrains Baking Companies, Inc., hereby petition this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Breedlove, et al., v. Earthgrains Baking Companies, Inc., d/b/a Campbell Taggart Baking Company, Inc.*, 140 F.3d 797 (8th Cir. 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 140 F.3d 797 (8th Cir. 1998), and is reprinted in the Petitioner's Appendix ("Pet. App."), at 1a. The order of the district court is

set forth in Pet. App. 10a. The judgment of the district court is set forth in Pet. App. 16a.

JURISDICTION

The Eighth Circuit issued its opinion on April 9, 1998. This petition was filed within 90 days. This Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1) (1970).

STATUTES INVOLVED

The relevant portion of the Worker Adjustment and Retraining Notification Act ("WARN" or "the Act"), provides:

> (a) Civil Actions Against Employers
>
> (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee;
>
> * * * *
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half of the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a) (1988).

STATEMENT OF THE CASE

In December of 1995, Respondent Earthgrains Baking Companies, Inc., d/b/a Campbell Taggart Baking Company, Inc. ("Earthgrains"), announced that it was closing, and shortly thereafter closed its baking plant in Little Rock, Arkansas, allegedly terminating approximately 100 full-time employees. Pet. App. 2a, 21a. In their July, 1996 class action complaint, Pet. App. 17a-25a, Petitioners, former Earthgrains employees, alleged that Earthgrains had violated WARN's notice provision, 29 U.S.C. § 2102(a). Pet. App. at 2a, 18a-23a. Petitioners sought, *inter alia,* "lost salaries, wages and benefits *for each calendar day* in which [Respondent was] in violation of the notice period . . . ." *Id.* at 10a (emphasis added). Respondent thereafter moved to dismiss, claiming that its liability to Petitioners ended at Respondent's payment of wages for each working day during the violation period. *Id.* at 2a. Petitioners then cross-moved for partial summary judgment on the issue. *Id.* at 11a.

On February 10, 1997, the district court granted Respondent's motion to dismiss. The court held that the statutory language "back pay for each day of violation" in and of itself created an ambiguity. *Id.* at 12a. The court then turned to WARN's legislative history and held that a superceded Senate Report on an earlier version of the Act reflected a Congressional intent "that damages should be calculated by working days within the notice period not by calendar days." *Id.* at 15a.

Petitioners appealed to the United States Court of Appeals for the Eighth Circuit. On April 9, 1998, the Eighth Circuit affirmed the district court's decision. In its decision, the Eighth Circuit rejected the Third Circuit's contrary holding in *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), and adopted the reasoning and conclusions of the Fifth Cir-

cuit in *Carpenters District Council of New Orleans & Vicinity v. Dillard Department Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1995), *cert. denied*, 513 U.S. 1126 (1995),[1] and the Sixth Circuit in *Saxion v. Titan-C Manufacturing Inc.*, 86 F.3d 553 (6th Cir. 1996).

In short, the Eighth Circuit concluded that the plain language of the statute "is susceptible to more than one reasonable interpretation," Pet. App. 6a, and then, like the district court, turned to the same language found in the superceded Senate Report. Pet. App. 7a-8a, *citing* S. Rep. No. 62, 100th Congress, 1st Sess. 24 (1987).[2] The Eighth Circuit relied on the following language of the Report:

> For violations of the notice provisions, damages are to be measured by the wages the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

Pet. App. 7a-8a. Relying on this single passage and the definition of "back pay" under the National Labor Relations Act, the court held that WARN Act damages are compensatory in nature and thus a work day calculation is proper.

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[1] The plaintiffs in *Carpenters* filed a petition for a writ of certiorari. This Court requested that the Solicitor General's office submit an amicus brief on this issue, which it did, recommending that the petition be granted and that the Fifth Circuit opinion be reversed.

[2] The Senate Report was superceded by a Conference Report which omits the language cited and contains language supporting the calendar day interpretation. H.R. Conf. Rep. No. 100-576, 100th Cong., 2nd Sess. 1052-1053 (1988). See discussion at pp. 17-19, *infra*.

REASONS FOR GRANTING THE WRIT

This case involves a conflict among five courts of appeals on a single, well-defined and important question of federal statutory interpretation that arises in each and every WARN case filed in this country. The issue goes to the heart of the meaning and purpose of this important federal labor statute. The fundamental question is whether the purpose of the WARN Act is to ensure that workers receive timely notice of plant closings and mass layoffs and critical retraining and readjustment assistance by providing employers with a clear incentive to comply with the statute, or whether it is merely to compensate workers by providing them with damages in lieu of notice. The former is what the statute plainly states; the latter is a concept which the plain language and structure of the WARN Act itself unambiguously reject, and which Congress, in passing the Act, also flatly rejected. The Eighth Circuit thus committed clear error and its judgment must be reversed.

THE EIGHTH CIRCUIT'S RULING THAT DAMAGES UNDER THE WARN ACT SHOULD BE CALCULATED ACCORDING TO THE NUMBER OF WORK RATHER THAN CALENDAR DAYS WITHIN THE STATUTORY NOTICE PERIOD IGNORES THE SCHEME AND EXPRESS LANGUAGE OF THE ACT, AND CONFLICTS WITH A RULING BY THE THIRD CIRCUIT THEREBY FOSTERING INCREASED LITIGATION THROUGHOUT THE VAST MAJORITY OF FEDERAL CIRCUITS.

I. There Are Now Five Circuits That Have Ruled on This Issue and the Conflict Among Them Has and Will Continue to Foster Litigation and Cause Similarly Situated Workers to Be Compensated Differently.

The WARN Act provides, in pertinent part, that "[a]ny employer who orders a plant closing [in violation of the Act] . . . shall be liable . . . for (A) *back pay for each day* of violation . . . ." 29 U.S.C. § 2104(a)(1)(A) (1988) (emphasis added). The conflict among the courts

of appeals turns on whether Congress intended that the term "back pay," read in conjunction with the term "each day of the violation," is a label for the method to determine the daily statutory penalty rate, or whether it is instead a method to limit damages to purely compensatory relief. Under the first approach, workers are entitled to damages for each *calendar day* of their employer's violation of the Act. Under the latter, compensatory approach, workers are only entitled to damages for each day of their employer's violation of the Act *on which they would have worked.* Given a full sixty day violation of the Act by an employer, the calendar day approach yields 60 days damages, the work day approach just 42, an approximate 30% difference in recovery.[3]

To date, in addition to the Eighth Circuit's decision which is the subject of this writ, three other circuits have adopted the work day approach. *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't. Stores, Inc.*, 778 F. Supp. 297 (E.D. La. 1991), *aff'd in part, rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). The Third Circuit alone has adopted the calendar day approach. United Steelworkers of America v. North Star Steel Co., 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 114 (1994), *reh'g denied*, 511 U.S. 1048 (1994).

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[3] The work day calculation also gives each employer a window of opportunity to save itself two or more "working days" by terminating employment, or delivering a late WARN notice on a Friday instead of a Monday. Moreover, the employer may make use of any un-paid holidays or self-declared temporary work stoppages falling within the time frame to provide it with still additional non-work day savings. Such manipulation of the notice requirements clearly contradicts Congressional intent that timely notice be provided to employees.

The remaining courts of appeals must choose among these two differing interpretations in ways that promise only to increase the uncertainty about what the law means and the rights and obligations of those to whom it applies. Because of the significant difference in damages yielded by the two approaches, *this uncertainty has and will continue to foster litigation in every WARN Act case in every remaining circuit.* The Ninth Circuit, for instance, is now considering this exact issue, *Burns v. Stone Forest Industries,* appeal docketed, No. 96-35715 (9th Cir., June 12, 1996), and many lower courts have considered the issue as well. Compare *Kalwaytis v. Preferred Meal Systems,* 1996 U.S. App. LEXIS 4207 (3rd Cir. Mar. 11, 1996); *Joshlin v. Gannett River,* 840 F. Supp. 660 (E.D. Ark. 1993); *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.,* 826 F. Supp. 326, 331 (C.D. Cal. 1993); *Georgia-Pacific v. Unemployment Board,* 630 A.2d 948 (Pa. Commonwealth Ct., 1993); and *United Electrical Workers v. Maxim, Inc.,* 5 IER Cases (BNA) 629, 631-32 (D. Mass. 1990) with *Association of Western Pulp and Paper Workers v. Grays Harbor Paper Co.,* 1994 U.S. Dist. LEXIS 13904 (W.D. Wash. 3/14/94); *Washington v. Aircap Indus., Inc.,* 860 F. Supp. 307, 311-313 (D.S.C. 1994); and *Jones v. Kayser-Roth Hosiery, Inc.,* 748 F. Supp. 1292, *amended in part,* 753 F. Supp. 218 (E.D. Tenn. 1990).

Consideration of this issue by this Court will eliminate unnecessary litigation; will avoid undue hardships, both on the employees and the employers, whose legal obligations remain uncertain; will promote uniform application of, and recovery under, an important federal statute; and will finally put an end to the continued litigation of this issue.

II. The Eighth Circuit Ignored the Express Language of the Statute, the Entire Statutory Scheme, and the Purpose of the WARN Act Which is to Compensate Workers for Loss of Notice, Not Loss of Employment.

In order to arrive at its conclusion that WARN Act damages are compensatory in nature, thereby justifying the work day approach, the Eighth Circuit violated basic rules of statutory construction by ignoring the Act's purpose, its plain meaning, and the entire statutory scheme.

A. *The Purpose of the WARN Act.*

As an initial matter, the Act must be construed according to its manifestly punitive and deterrent purpose.[4] The principal rationale for WARN's advance notice requirement is to provide an opportunity for the affected government units and unions to assist workers with readjustment assistance and re-employment.[5] Congress thought that this goal could not be realized unless workers had collective access to the facilities of a functioning operation. As the Act's sponsor Senator Metzenbaum explained:

> The important element in our bill is to see to it that people have the time to seek readjustment and re-

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[4] "When interpreting a statute, the courts will not look merely to the particular clause in which the general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law." *Kokoska v. Belford*, 417 U.S. 642, 650, *reh'g denied*, 419 U.S. 886 (1974). *See also, United Food and Commercial Workers v. Brown*, 517 U.S. 544 (1996).

[5] The main vehicle by which this is to be accomplished is the Economic Dislocation and Worker Adjustment Assistance Act ("EDWAA"), 29 U.S.C. §§ 1651-1662b (1988). EDWAA provides adjustment services to dislocated workers by linking state dislocated worker units, local governments, and unions and employers. There is also an opportunity for employees to seek new employment, or retraining and income support through either the Trade Adjustment Assistance program, 19 U.S.C. §§ 2271-2322 (1975), or the NAFTA Transitional Adjustment Assistance program, 19 U.S.C. § 2331 (1993).

> training while they are working . . . . We are not seeking to get workers paid because their plant is closing . . . .

134 Cong. Rec. 15,928 (1988). The utility of having the plant as a place for workers facing a common difficulty to congregate and address its solution is what makes advance notice critical. Quoting the Secretary of Labor's Task Force, Senator Metzenbaum stated:

> Advance notice is essential because notice facilitates greater participation [in retraining, counseling, and placement programs] and because a functioning plant is perhaps the programs' single most important resource.

Id. The concern is that if the workers disperse when they are laid off, few will become involved in worker adjustment programs, whereas two months notice *prior to closing* provides a geographical locus for near-universal participation. Indeed, Senator Metzenbaum cited a General Motors study which documented 15% participation without in-plant involvement, and 85% with in-plant participation. *Id.* This vast disparity and the concern for effective retraining and/or placement is why Congress designed the Act to require employers to give notice, not damages in lieu of notice.

The work day calculation, however, eviscerates this fundamental goal of the Act. It requires only that the employer pay the same amount to its workers as it would have if notice had been given. Thus, there is no penalty for non-compliance and no incentive to comply.

The work day view of WARN Act damages as compensatory relief is also inconsistent with the recent description by this Court of WARN Act damages as "penalties." *North Star Steel,* 515 U.S. 29, 31 (1995) (WARN Act damages are meant to provide for "*penalties* by way of a civil action . . . .") (emphasis added). Compensatory damages are not a penalty; they are a make-whole remedy. Dan B. Dobbs, *The Law of Remedies* § 3.1

(1973). Damages as penalties are meant "to punish and to set an example that will deter similar conduct in the future." *Id.* at § 3.9. Only the calendar day method, which requires an employer who fails to give notice to employees to pay its employees for "each day" of the violation provides employers with an incentive to comply with the Act by penalizing them for non-compliance.

The Eighth Circuit's tentative conclusion that damages under the work day computation are nonetheless punitive is ill-founded. The court found that "[e]mployers are, *in a sense*, penalized by not using the notice provisions because they must pay affected workers wages although no work was done." Pet. App. 8a (emphasis added). Its reasoning here is circular in that it presupposes the very issue at the heart of this controversy: that the payment of WARN damages is the payment of wages for labor rather than a penalty. Moreover, not only are work day damages not punitive, they are not even fully compensatory as they redress only a fraction of the wrong visited upon employees by the non-complying employer. If one accepts the Eighth Circuit's conclusion that WARN damages are in fact wages, in no way do work day damages account for the lack of advanced notice and centralized retraining and placement assistance which are the very purpose of the Act itself. *See supra* pp. 8-9.

B. *The Act's Plain Language and Statutory Scheme.*

In a number of ways, the Eighth Circuit selectively ignores the plain meaning of the statute and the overall statutory scheme. First, as the Third Circuit observed:

> It is undisputed that the days of the violation period are 'calendar days' rather than workdays. *See* 20 C.F.R. § 639.1(a) (1992) ("[WARN] . . . requir[es] employers to provide notification 60 calendar days in advance of plant closings or mass layoffs."); *id.* 639.5(a) ("[N]otice must be given at least 60 calendar days prior to any planned plant closing or mass layoff. . . ."). In fact, no section of WARN expressly

> refers to "workdays" (as opposed to calendar days). Thus, under the plain language of the statute, a violating employer is liable for "back pay" for each of the calendar days of the violation.

North Star Steel, 5 F.3d at 42. A contrary reading violates the basic rule that "[i]dentical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Were a work day interpretation imposed consistently throughout the statute, an employer's obligations would be correspondingly expanded.[6]

The work day approach also renders the following language of the Act's damages provision nonsensical and superfluous:

> Such liability [to aggrieved employees] shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a). If indeed Congress intended the work day approach, then, under the rate of compensation calculation provisions of 29 U.S.C. § 2104(a)(1)(A), the 60 day maximum would only be applicable to employees who worked a contiguous 60 day period immediately prior to their termination, or those who, over the three years immediately preceding their termination, worked on average 60 day contiguous periods. Both of these scenarios defy common sense. The clear and unambiguous reading of the 60 day cap on damages is that it is tied directly to the 60 day advanced notice requirement.

The work day interpretation is also inconsistent with the plain meaning of the seldom exercised civil enforce-

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[6] For instance, the 60 days advanced notice required by the Act, 29 U.S.C. 2102(a), would, given an average 5 day working week, be expanded to 84 days, an interpretation that employers, including Respondent, most assuredly would not urge.

ment provision of the Act, 29 U.S.C. § 2104(a)(3), which provides for a $500 a day civil fine payable to a local governmental authority for the employer's failure to notify it. The Conference Report provides that "the maximum penalty payable to a local government is $30,000." [7] H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 1053, *reprinted in* 1988 U.S.C.C.A.N. 2086. Divided by $500 per day, the $30,000 results in 60 days of violation. The anomaly in the Eighth Circuit's reasoning is that one sort of penalty, due the local government, is calculated by calendar days while the other, due the employees, is calculated by working days.

The Eighth Circuit glossed over the statute's inclusion of the phrase "for each day of violation," in contravention of a basic rule of statutory construction that the meaning of a word in a statute should first be determined from the context in which it is used. *Deal v. United States,* 508 U.S. 129, 131 (1993). Moreover, Congress' inclusion of this phrase must be assumed to have had a purpose.[8] As the district court in *Carpenters v. Dillard* reasoned:

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[7] The Conference Report treats the civil fine provision and back pay award similarly, determining the amount owed by subtracting the days of notice actually given from sixty days. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988).

[8] The Eighth Circuit's disregard of this phrase is not unlike a problem faced just two years ago in another WARN Act case. In *United Food and Commercial Workers v. Brown,* 517 U.S. 544 (1996), the employer asked this Court to conclude that WARN's provision for suits by unions was attributable only to congressional inadvertence. There, this Court said that

> [t]he argument for Brown Shoe's preferred construction simply rests on one speculative possibility in opposing a straightforward reading of the provision that a union may bring suit on behalf of its members . . . Speculation loses, for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.

Id. at 550.

> There is no rational explanation for inclusion in the Act of the phrase "for each day of violation" if Congress intended to limit an employee's recovery only to wages he would have earned during the period of the violation.

Carpenters District Council of New Orleans and Vicinity v. Dillard Department Stores, Inc., 778 F. Supp. 297, 309 (E.D. La. 1991), *aff'd in part, rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Had Congress intended compensatory relief, it could have required, for instance, back pay for "the period" of violation, or for each "working day" of the period. It did not.

Further, the Act is clear that damages do not reflect actual losses in wages to employees, unlike traditional compensatory relief. Damages are not computed by looking ahead to what an employee would have earned during the violation period, as is true under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) (1988), or the National Labor Relations Act, 29 U.S.C. § 160 (1988). Accordingly, dislocated workers are not required to mitigate their damages.[9] Employers are also prohibited from offsetting WARN damages by damages acquired by plaintiffs through causes of action arising under employment contracts or other statutes. 29 U.S.C. § 2105 (1988). Finally, Courts are not allowed to equitably enjoin a mass layoff or plant closing, 29 U.S.C. § 2104(b) (1988), in contrast to other laws that provide for make-whole relief. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982).

Each of the foregoing factors clearly demonstrate the punitive nature of WARN Act damages. However, the

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[9] The Conference Report states: "[The only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compenasion payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988).

Eighth Circuit failed to address any of these factors and instead turned to another statute—the National Labor Relations Act—for a 'make-whole' definition of 'back pay' that supported its finding that the use of that term in conjunction with "for each day of the violation" created an ambiguity that required resort to legislative history. Pet. App. 6a. The Eighth Circuit thus erred by disregarding WARN's abundantly plain statutory scheme.

In sum, workers are compensated under the WARN Act for loss of notice, not loss of employment. The Eighth Circuit erred by treating the WARN Act as one designed merely to provide damages in lieu of notice, a concept unambiguously and unequivocally rejected by Congress. *See infra* pp. 18-19.

III. The Eighth Circuit Erred by Departing from the Plain Meaning of the Act by Relying on Insignificant and Non-Existent Ambiguities.

The Eighth Circuit identified several "ambiguities" in the language of the Act to justify its reliance on the superceded Senate Report on an earlier version of the Act for support of the work day calculation. These purported ambiguities are either non-existent or insignificant. Legislative history is appropriate as "an additional tool of analysis," but only the "most extraordinary showing of contrary intentions" from the legislative record justifies a departure from the 'plain meaning' of the statutory language. *Garcia, et al. v. United States,* 469 U.S. 70, 75 (1984) (*citations omitted*). There was no extraordinary showing of contrary intentions here.

First, the Eighth Circuit followed the Fifth and Sixth Circuits, disagreeing with the Third Circuit's conclusion that the workday calculation would render superfluous the statute's "offset" provision, 29 U.S.C. § 2104(a)(2). *See* Pet. App. 7a (citing *Dillard,* 15 F.3d at 1283 n.14 (5th Cir. 1994); *Saxion,* 86 F.3d at 559-60 (6th Cir. 1996)). That section reduces an employer's liability by "any wages

paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(2)(A)(B). The Third Circuit found that under a lost earnings concept, courts would automatically deduct any money paid in excess of lost wages from the damages, rendering the offset provision superfluous. *North Star Steel,* 5 F.3d at 42.

The Eighth Circuit disagreed, relying without comment on the Fifth and Sixth Circuits' rationale. Those courts found that because a terminated employee cannot earn any wages during the violation period, the offset provision applies only to employees suffering a greater than 50 percent reduction of work hours during each month of any 6 month period, and not to those who lose their jobs entirely. *See* Pet. App. 7a (*citing Dillard,* 15 F.3d at 1283 n.14; *Saxion,* 86 F.3d at 559-60). According to the rationale adopted by the Eighth Circuit, the work day interpretation thus does not render the offset provision superfluous. Rather, it fulfills the purpose of the offset provision—to protect employers by ensuring that statutory damages never duplicate wages already received. *See Dillard,* 15 F.3d at 1283, n.14; *Saxion,* 86 F.3d at 559.

This rationale turns on the confused and incorrect notion that only wages are offset, so that the offset provision does not apply to terminated employees. In fact, any money an employer pays that is not actually owed is offset, whether or not the employee is terminated. 29 U.S.C. § 2104(a)(2)(B); *see Jones v. Kayser-Roth Hosiery Inc.,* 748 F. Supp. 1276, *amended in part,* 753 F. Supp. 218 (E.D. Tenn. 1990) (voluntary severance payments deducted). For example, employees on temporary layoff status are entitled to receive notice under the WARN Act and to recover damages if their employer neglects to notify them. *Id.*

The Eighth Circuit then embraced a hypothetical anomaly created by the Sixth Circuit. The court speculated that a full-time employee working 40 hours a week, eight hours a day, would be paid less under the calendar day approach than a part-time employee working one day a week for ten hours. *See* Pet. App. 7a, (citing *Dillard*, 15 F.3d at 1285). *This hypothetical anomaly rests on erroneous assumptions about the rate of compensation.*

The Act requires that employees receive:

> back pay for each day of violation at a rate of compensation not less than the higher of . . . the average regular rate received by such employee during the last 3 years of the employee's employment or . . . the final regular rate received by such employee.

29 U.S.C. § 2104(a)(1)(A) (1988). The term "regular rate" is derived from the Fair Labor Standards Act, which requires that damages be determined by taking the "total remuneration for employment" and dividing it by the number of hours a week the employee actually worked. 29 C.F.R. § 778.109 (1993); 29 U.S.C. § 207(o)(4) (1988). This provision is based on a 40 hour work week. *Id.* A full-time employee is awarded damages based on a 40-hour, five-day week. A part-time employee's hours may be averaged over a 40 hour, five-day week. Hence, the part-time employee who worked a 20 hour week receives damages based on an average of four hours of work per day, five days a week. The Eighth and Sixth Circuits' concerns about inequity are thus unfounded.

Finally, by adopting the rationale of the *Saxion* and *Dillard* courts, the Eighth Circuit disagreed with the Third Circuit's conclusion that a work day computation creates a conflict between WARN's damages provision, 29 U.S.C. § 2104(a)(1), and its offset provision, 29 U.S.C. § 2104 (a)(2)(A), by allowing the employer "to reduce its liability by any earnings that the employees received during the period of the violation, even if those earnings were received from a different employer." *See* Pet. App. 7a

(*citing Dillard,* 15 F.3d at 1284 n.14). The Eighth Circuit was apparently untroubled by Congress' failure expressly to allow employers to reduce their liability by the amount of their employees' outside earnings, speculating that the omission was attributable to other factors. *Id.* Yet *Saxion, Dillard* and the Eighth Circuit all fail to cite any supporting authority for the assumption. Indeed, the language of the statute itself indicates that Congress did not intend WARN Act damages to be offset in this manner. 29 U.S.C. § 2104(a)(2)(A) ("The amount for which an employer is liable under paragraph (1) shall be reduced by (A) any wages paid by *the employer* to the employee for the period of the violation.") (emphasis added). The Eighth Circuit's interpretation (really that of the *Saxion* and *Dillard* courts), creates a conflict between the statutory provisions for damages and offset, and was error.

IV. The Eight Circuit Erred by Resorting to Legislative History Which Conflicts With the Express Terms of the Statute.

In light of the foregoing, the Eighth Circuit should not have disregarded the text of the statute and turned to the superceded Senate Report which does not clarify this issue at all and *is itself internally inconsistent.* The passage relied upon by the Eighth Circuit states:

> For violations of the notice provisions, damages are to be measured by the wages the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

Pet. App. 8a, *citing* S. Rep. No. 100-62, at 24. The first sentence of this passage would seem to support a work

day computation. But the make whole remedy suggested there is entirely inconsistent with the second sentence which states that the damages are intended to be punitive and a deterrent, a notion that is itself inconsistent with the concept of liquidated damages, which cannot be punitive. Dobbs, Remedies § 12.5 at 821.

In short, this single, superceded Senate Report makes little sense and cannot, in and of itself, be justifiably relied upon to determine such a critical and wide impacting issue of federal law. At minimum, this confused passage falls far short of the "extraordinary showing of contrary intentions" required by this Court when resorting to legislative history as a tool of statutory analysis. *Garcia, et al. v. United States*, 469 U.S. 70, 75 (1984) (*citations omitted*).

Further, a Conference Report superceded this Senate Report and the problematic language does not appear there. Significantly, the section on damages in that report contains other language supporting the calendar day interpretation. *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052-1053 (1988). In fact, the Conference Report provides that "for *each day of violation*, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff, as set forth in section [5(a)(1)]." *Id.* at 1052 (emphasis added).

Additionally, the Eighth Circuit all but ignored an amendment offered by Senator Quayle and expressly rejected by Congress that would have treated WARN Act damages as compensatory in purpose. 134 Cong. Rec. 15,926 (June 24, 1988). The rejected amendment, as explained by Senator Quayle, would have allowed "60 days severance pay in lieu of notice." *Id.* Arguing against the amendment, Senator Metzenbaum, the Act's sponsor, stated: "The bill is about giving notice. It is not a mandatory severance bill . . . ." *Id.*

The Eighth Circuit found that the rejection of the amendment evinced a congressional purpose to require employers to give notice instead of pay in lieu thereof. Pet. App. 9a. Nonetheless, the court found this clear purpose unpersuasive in light of the superceded Senate Report, and thus adopted the work day approach in direct contravention of this recognized purpose, expressly allowing employers to do what Congress would not.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-2057

RICHARD BREEDLOVE, individually, and on behalf of all others similarly situated; NADINE TANNER, individually, and on behalf of all others similarly situated,

Plaintiffs/Appellants,

v.

EARTHGRAINS BAKING COMPANIES, INC., doing business as CAMPBELL TAGGART BAKING COMPANY, INC.,

Defendant/Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: November 19, 1997
Filed: April 9, 1998

Before McMILLIAN and WOLLMAN, Circuit Judges and STEVENS, District Judge.[1]

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[1] The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

STEVENS, District Judge.

Plaintiffs/appellants are former employees of appellee/defendant Earthgrains Baking Companies, Inc. ("Earthgrains"). Plaintiffs brought this suit against Earthgrains pursuant to the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 et seq. The district court [2] granted Earthgrains' motion to dismiss on the ground that plaintiffs had been compensated fully under the WARN Act. *See Breedlove v. Earthgrains Baking Companies, Inc.*, 936 F. Supp. 802 (E.D. Ark. 1997). We affirm.

I.

Plaintiffs worked at Earthgrains' baking plant in Little Rock, Arkansas. In December of 1995, Earthgrains notified its employees, including plaintiffs, that it would close the Little Rock plant. Plaintiffs then brought suit alleging that Earthgrains had violated the WARN Act's notice provision, 29 U.S.C. § 2102, which requires certain employers "to provide written notice to each affected employee sixty (60) days in advance" of the closing of a covered facility.[3] In their complaint, the plaintiffs sought recovery of wages that they claim should have been paid during the notice period. They admitted that Earthgrains had "paid [them] for working days within the required 60 day notification period." App. 95, Compl. ¶ 14. However, the employees alleged that they were entitled to wages for each calendar day within the violation period.

Earthgrains then moved to dismiss the action. Earthgrains claimed, on the basis of plaintiffs' admission that Earthgrains had paid wages for working days within the notification period, plaintiffs had not stated a claim for

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[2] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

[3] On this appeal, there is no dispute that Earthgrains was an "employer" subject to the WARN Act's provisions and that Earthgrains' actions triggered the notice requirement.

relief. Earthgrains contended that these wages constituted the entire amount they were obligated to pay under the WARN Act. Plaintiffs concurrently moved for summary judgment claiming that they were entitled to wages for each calendar day within the violation period as a matter of law. The district court granted Earthgrains' motion to dismiss and denied plaintiffs' motion for summary judgment, holding that the employees were entitled only to wages for each working day within the notification period. The district court found that the damages provision of the WARN Act was capable of more than one reasonable interpretation and, therefore, examined the legislative history to discern Congressional intent. Finally, the district court found that the legislative history demonstrated that Congress "unequivocally" intended that damages be measured by working days rather than calendar days. *See* 963 F. Supp. at 805.

II.

The standard for a district court to employ in ruling a motion to dismiss is clear. A district court must accept the allegations contained in the complaint as true, *see Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. *See Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). "[D]ismissal is inappropriate 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McCormack v. Citibank, N.A.*, 979 F.2d 643, 646 (8th Cir. 1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Our standard of review of a district court's grant of a motion to dismiss is similarly clear. We review de novo. *See Hafley*, 90 F.3d at 266; *First Commercial Trust Co., N.A. v. Colt's Mfg. Co., Inc.*, 77 F.3d 1081, 1083 (8th Cir. 1996); *Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995).

III.

The issue of whether an employer's liability to affected employees due to a violation of the WARN Act's notice requirement should be calculated based on working days or calendar days has been addressed by several courts. The majority of Circuit Courts have held working days to be the proper basis for the calculation. *See Carpenters District Council v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1282-86 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553, 558-61 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995), *cert. dismissed*, 116 S. Ct. 1588 (1996). Only one Circuit Court has held that compensation to employees for a violation of the WARN Act's notice provisions is based on calendar days rather than working days. *See United Steel Workers of America v. North Star Steel Co., Inc.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994). As noted above, the district court in this case found working days to be the proper basis, *see* 963 F. Supp. at 805, while another judge of the same district previously held that liability was based on calendar days. *See Joshlin v. Gannett River States Publ'g Corp.*, 840 F. Supp. 660 (E.D. Ark. 1993). The issue, however, is one of first impression for this Court.

A.

An employee's compensation when an employer violates the WARN Act's notice requirement is governed by 29 U.S.C. § 2104(a)(1). The statute provides that any employer who violates the notice provision "shall be liable to each aggrieved employee who suffers an employment loss for "back pay for each day of violation." *Id.* Our analysis, of course, begins by examining the language of the statute. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citing

Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)); *United States v. Bishop*, 894 F.2d 981, 985 (8th Cir.), *cert. denied*, 498 U.S. 836 (1990). If the statute is clear and unambiguous because it is not possible to construe it in more than one reasonable manner, we need go no further. *See In re Erickson Partnership*, 856 F.2d 1068, 1070 (8th Cir. 1988); *Beef Nebraska, Inc. v. United States*, 807 F.2d 712, 717-18 (8th Cir. 1986) (citing *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980)).

The statute defining compensation to be paid for a notice violation reads as follows:

> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> > (A) back pay for each day of violation at a rate of compensation not less than the higher of—
> >
> > > (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
> >
> > > (ii) the final regular rate received by such employee; and
> >
> > (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.
>
> Such liability shall be calculated for the period of violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a)(1).

Of course, the relevant language in this case is the phrase "back pay for each day of violation." *Id.* § 2104 (a)(1)(A). On one hand, the term "back pay" seems to imply wages that the employee would have received absent a violation. The Supreme Court construed the term "back pay" as used in the National Labor Relations Act as "payment of a sum equal to what [an employee] normally would have earned absent a violation of the statute." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). Using working days to calculate an employer's liability could be a reasonable interpretation of this language. On the other hand, the phrase "for each day of violation" seems to imply that an employee would receive daily wages for each day of the violation period. Using calendar days to calculate an employer's liability could be a reasonable interpretation of this language.

Thus, in our view, the statute is susceptible to more than one reasonable interpretation. If "for each day of violation" mandated the use of calendar days, employees would be paid for days on which they do not work. Such an interpretation would fly in the face of what is commonly thought of as "back pay." To interpret the phrase "back pay for each day of violation" to mean that employees should receive wages on days they otherwise would not have been paid would be to write the "back pay" out of the statute. But to interpret the statute, on its face, as requiring the use of working days alone to arrive at a figure for "back pay," would not fully account for the phrase "for each day of violation."

The Third Circuit in *North Star Steel* came to the opposite conclusion, finding that the statute could not be reasonably construed in more than one way. The *North Star Steel* Court held that the term "back pay" is "simply a label used to describe the amount of damages for which an employer is liable for each day of the violation." *North Star Steel*, 5 F.3d at 42. It reached this conclusion using three common rules of statutory construction. *See id.* at

42-43. We, however, agree with the conclusions of the Fifth and Sixth Circuits that none of the rules of statutory construction used by the Third Circuit compelled the result that the Third Circuit reached. *See Dillard*, 15 F.3d at 1283 n.14; *Saxion*, 86 F.3d at 559-60. As demonstrated by their analyses, we believe that interpreting this provision on its face using rules of statutory construction creates even more ambiguity as to its proper meaning.

A statute can also be considered ambiguous when a particular interpretation from the face of a statute could lead to an anomalous, unusual or absurd result. A hypothetical situation, as set forth in *Dillard* is illustrative.

> [T]he violation period contains sixty days. Employee "A" is a full-time employee who works a regular eight-hour shift each weekday. However, employee "B" is a part-time employee who works just one ten-hour shift each Saturday. Under the . . . calendar-day approach, employee "A" would receive 480 hours pay in lieu of notice (eight hours per day times sixty days), while part-time employee "B" would receive 600 hours pay (ten hours per day times sixty days).

Dillard, 15 F.3d at 1285. Although Congress could possibly have intended this result, we believe that this hypothetical outcome is so unusual that we cannot ignore the likelihood that the legislative history would clarify Congress' intent.

B.

Having determined that there is ambiguity in the statute because it is subject to more than one reasonable interpretation, we next turn to the legislative history. As the Fifth and Sixth Circuits noted, a Senate Report regarding this legislation provides the answer. *See Dillard*, 15 F.3d at 1284-85; *Saxion*, 86 F.3d at 560.

> For violations of the notice provisions, damages are to be measured by the wages the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the

> notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong. 1st Sess. 24 (1987). Since "damages are to be measured by the wages the employee would have received," *id.*, the number of working days within the violation period must be used to calculate the amount owed by the employer. *See Dillard*, 15 F.3d at 1284. Also, the Senate Report language "mirrors" the interpretation of "back pay" in *Phelps Dodge Corp. v. NLRB*. Jeffrey Turner, Comment, *Damages Under the Workers Adjustment and Retraining Act (WARN): Why Damages Cannot Be Based on Calendar Days*, 12 T.M. Cooley L. Rev. 197,213 (1995). Therefore, we believe that the Senate Report's statement decides the issue.[4]

Plaintiffs argue that there is an inconsistency between the first sentence and the second sentence of the Senate Report statement quoted above. Plaintiffs reason that the first sentence indicates a "make-whole" calculation of damages while the second sentence mandates a remedy which is punitive in nature. We are unpersuaded that there is an inconsistency. Employers are, in a sense, penalized by not using the notice provisions because they must pay affected workers wages although no work was done. The WARN Act's provisions can still be viewed as punitive or deterrent even though the employees do not receive an undue windfall. Ultimately, however, we find the clear statement of the Senate Report controlling.

Plaintiffs also argue that the purpose of the WARN Act is to provide workers who are laid off notice so that they

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[4] We also note that the Senate appears to have reached a consensus that the WARN Act is not a way "to place an additional financial burden on the employers of this country." 134 Cong. Rec. 15,928 (1988) (statement of Sen. Metzenbaum).

may adjust to changed circumstances, describing the WARN Act as requiring notice so that employees may continue to be at the plant or factory location and gather to receive counseling and training. Plaintiffs refer to legislative debate which rejected an amendment to the WARN Act to allow "severance pay in lieu of notice." 134 Cong. Rec. 15,926 (1988) (statement of Sen. Quayle). *See also id.* at 15,928 (statement of Sen. Metzenbaum) ("[T]he bill is about giving notice. It is not a mandatory severance bill . . . ."). Although the debate evinces a purpose to require employers to give notice rather than allowing them to thwart the purposes of the statute by giving affected workers "severance pay," we believe it does not overcome the clear intention manifested in the Senate Report.

Moreover, this Court has characterized the WARN Act as "most closely analogous to an action to recover damages for a breach of an implied contract (or breach of an obligation) to notify employees for terminating them." *Aaron v. Brown Group, Inc.*, 80 F.3d 1220, 1225 (8th Cir. 1996). This bolsters our conclusion that Congress did not intend to provide employees who did not receive notice more compensation than they would have received had notice been given.

IV.

We hold that an employer's liability under the WARN Act's compensation provision, 29 U.S.C. § 2104(a)(1), is calculated based on working days. Because the employees admitted in their complaint that they were paid all wages for working days within the violation period, we affirm the decision of the district court to dismiss the complaint for failure to state a claim upon which relief could be granted.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

[Filed Feb. 10, 1997]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-96-549

RICHARD BREEDLOVE, *et al.*,
Plaintiffs

vs.

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.
Defendant

ORDER

Pending before the Court are defendant's motion to dismiss (#8) and plaintiffs' motion for partial summary judgment (#14). For the reasons stated below, the motion to dismiss is granted (#8).

Plaintiffs filed their complaint alleging the defendant had violated the Worker Adjustment and Retraining Act ("WARN Act"), 29 U.S.C. §§ 2101-2109 by failing to provide written notice to each affected employee sixty (60) days in advance" of the closing of defendant's Little Rock facility. 29 U.S.C. § 2102. As damages, plaintiffs sought lost salaries, wages and benefits for each calendar day in which defendants were in violation of the notice period, prejudgment interest, costs, attorney's fees and a civil penalty of $500.00 per day for each day of the alleged violation. Defendant filed a motion to dismiss plaintiffs' complaint on the grounds that the plaintiffs were

not entitled to back pay for each calendar day in which defendants were in violation of the notice period and were not entitled to a civil penalty. Plaintiffs moved for partial summary judgment on the method of calculation regarding back pay and benefits.

The issue before the Court is whether employees are entitled to back pay for violation of the notice provision of the WARN Act for each calendar day up to sixty (60) days as claimed by the plaintiffs or for only the actual working days within the sixty (60) days as claimed by the defendant.

The WARN Act provides the following:

(a) Civil Action against employers

(1) Any employer who orders a plant closing or mass lay-off in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or lay-off for—

(A) *Back pay for each day of violation* at a rate of compensation not less than the higher of—

(i) The average regular rate received by such employee during the last three years of the employees employment; or

(ii) The final regular rate received by such employee; and

(B) Benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

> *Such liability shall be calculated for the period of violation, up to a maximum of sixty days,* but in no event for more than one half the number of days the employee was employed by the employer.
>
> . . . (3) Any employer who violates the provisions of section 2102 of this title with the respect to a unit of local government shall be subject to a civil penalty of not more than $500.00 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within three weeks from the date the employer orders the shut down or lay-off.

28 U.S.C. § 2104(a) (emphasis added).

The starting point in statutory construction is the language of the statute itself. *U.S. v. Bishop,* 894 F.2d 981, 985 (8th Cir., *cert. denied,* 498 U.S. 836 (1990). If the language is clear and unambiguous, the inquiry is over. If, however, a statute is susceptible of more than one reasonable interpretation, then the reviewing court must look beyond the language of the statute to ascertain the intent of the legislative body. *In re Hammers,* 988 F.2d 32, 34 (5th Cir. 1993).

Section 2104 of the Act addresses the damages an employer must pay if it does not give adequate notice of a plant closing. If an employer violates the notice provision, the employer must pay the employee "back pay for each day of the violation." 29 U.S.C. § 2104(a)(1)(A). What is ambiguous and subject to differing interpretations are the terms "back pay" and "for each day of the violation."

The term "back pay" suggests a lost earnings concept requiring payment of a sum that restores the employee to the position he would be in if the layoff had never occurred. The term "each day of the violation" seems to require payment for each calendar day within the violation period which would more than restore the employee to his position as if the layoff had not occurred. *See Carpenter's Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1286 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 933 (1995).

Circuit courts have reached differing conclusions as to the proper calculation of damages pursuant to 29 U.S.C. § 2104(a)(1)(A). The Third Circuit holds that the statute requires payment of damages based upon the number of calendar days within the violation period. *See United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994). The Fifth and Sixth Circuits reason that the use of the term "back pay" immediately followed by the phrase "for each day of the violation" makes the damage provision of the statute ambiguous requiring a reference to the intent of the legislature. *See Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553, 561 (6th Cir. 1996); *Carpenter's Dist. Council v. Dillard Dep't. Stores*, 15 F.3d at 1286. The Eighth Circuit has not ruled on this precise issue.

Plaintiff urges that this Court adopt Senior District Judge Eisele's ruling that the statute is absolutely unambiguous on its face that back pay is required for "each day of violation." *See Joshlin v. Gannett River States Pub. Corp.*, 840 F.Supp. 660 (E.D. Ark. 1993). Although this Court has the utmost respect for the opinions of Judge Eisele, it must disagree with the ruling in *Joshlin* and find that the statute at issue is capable of more than one reasonable interpretation for the following reasons.

At the time of Judge Eisele's opinion, all of the existing case authority supported his ruling. Since that time, two circuits have issued contrary opinions. *See Saxion*, 86

F.3d at 561; *Carpenter's*, 15 at 1286. Moreover, one of the district court opinions upon which Judge Eisele relied was subsequently overruled. *See Carpenter's Dist. Council v. Dillard Dep't. Stores*, 778 F.Supp. 297 (E.D. La. 1991) *rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 993 (1995).

Finally, Judge Eisele based his ruling in part on his characterization of the WARN Act as a "punitive statute not a 'make-whole statute'." *Joshlin* at 663. Since Judge Eisele so reasoned, the Eighth Circuit has ruled in *Aaron v. Brown Group, Inc.*, 80 F.3d 1220 (8th Cir.), *cert. denied*, 117 S.Ct. 361 (1996) that a state statute of limitations for penal actions was inapplicable to the WARN Act. The Eighth Circuit affirmed the lower court in *Aaron* which specifically rejected the application to the WARN Act of a statute of limitations for penal actions because, it concluded, the WARN Act did not operate as a penalty to employers and instead was remedial in nature. *Id.* Other district courts have reached a similar conclusion. *Wholesale and Retail Food Distribution Local 63 v. Santa Fe Terminal Serv.*, 826 F.Supp. 326, 330 (C.D. Cal. 1993); *Solberg v. Inline Corp.*, 740 F.Supp. 680, 685 (D. Minn. 1990).

Because this Court finds the statute capable of more than one reasonable interpretation, the Court must look to the legislative intent to determine its meaning.

The clearest statement made with respect to the damage portion of the WARN Act is contained in the Senate Report:

> [f]or violations of the notice provision, *damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period*, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions

> [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S.Rep. No. 62, 100th Cong., 1st Sess. 24 (1987) (emphasis added).

This Court agrees with other courts who have considered this legislative history and found that this language states unequivocally that congressional intent is that damages should be calculated by working days within the notice period and not by calendar days.

Plaintiffs have now conceded that defendant notified the state dislocated worker unit and the chief elected official of the unit of local government as required by the WARN Act. Plaintiffs learned of this notification through discovery and are no longer claiming a civil penalty.

Defendant contends the making of a claim for civil penalties violates Rule 11 of Federal Rules of Civil Procedure and entitles it to an award of attorney's fees. This Court disagrees and declines to award any fees to defendant. Plaintiffs complied with Rule 8 of Federal Rules of Civil Procedure in notifying defendant of all claims which they intended to assert. Upon discovering the true facts, they abandoned this claim. There is no indication of bad faith on the part of plaintiffs or their attorneys which would justify the imposition of fees or costs.

Defendant's motion to dismiss is granted (#8). Plaintiffs' motion for partial summary judgment is denied (#14). Plaintiffs' motion to certify class action (#2) and defendant's motion to stay certification of class action (#10) are rendered moot.

IT IS SO ORDERED this 10th day of Feb., 1997.

/s/ James M. Moody
JAMES M. MOODY
United States District Judge

[Filed Feb. 10, 1997]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Case No. LR-C-96-549

RICHARD BREEDLOVE, *et al.*,
Plaintiffs

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.
Defendant

JUDGMENT

Pursuant to the Order entered in this matter on this date, it is Considered, Ordered and Adjudged that the complaint in this case be, and it is hereby, dismissed.

IT IS SO ORDERED this 10th day of February, 1997.

/s/ James M. Moody
JAMES M. MOODY
United States District Judge

APPENDIX C

[Filed Jul. 17, 1996]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil Action No. LR-C-96-549

RICHARD BREEDLOVE and NADINE TANNER,
Individually, and on behalf of all others similarly situated,
Plaintiffs

v.

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.,
Defendants

PLAINTIFFS DEMAND A JURY TRIAL

COMPLAINT—CLASS ACTION

COME NOW the plaintiffs, by and through their undersigned attorneys, Martin, Trumbo & Sterling, Fayetteville, Arkansas, and for their Complaint against the defendant, state and allege as follows:

JURISDICTION

(1) This Court has jurisdiction over this class action pursuant to 28 U.S.C. § 1331 and § 1337 as well as 29 U.S.C. § 2104(a)(5), because of claims brought under 29 U.S.C. § 2101 *et. seq.*, the Worker Adjustment and Retraining Notification Act ("WARN").

VENUE

(2) Venue is proper herein pursuant to 28 U.S.C. § 1391(b) and (c) because the defendant was, for the period relevant herein, doing business in the Eastern District of Arkansas, Western Division, and the claims alleged herein arose in Little Rock, Arkansas within the Eastern District of Arkansas, Western Division.

PARTIES

(3) The named plaintiffs herein at all times relevant to this complaint were past employees at the Earthgrains Baking Companies, Inc. d/b/a Campbell Taggart Baking Company, Inc., located in Little Rock, Arkansas, whose positions were terminated beginning in or about December, 1995, or shortly thereafter.

(4) The defendant, Earthgrains Baking Companies, Inc. d/b/a Campbell Taggart Baking Company, Inc. (hereinafter "Earthgrains"), was at all times relevant herein, a Delaware corporation. At all times relevant herein, Earthgrains was an "employer" as that term is defined within the meaning of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 (a)(1) (hereinafter "WARN Act").

CLASS ACTION ALLEGATIONS

(5) The named plaintiffs herein bring this action on behalf of themselves and, pursuant to Rules 23 (a)(b)(1) and (b)(3) of the Federal Rules of Civil Procedure and 29 U.S.C. 29 U.S.C. [sic] § 2104 (a)(5)(A), on behalf of a class consisting of themselves and of all other persons similarly situated for the following reasons:

> (a) That the class of "aggrieved employees" of the defendants under WARN is so numerous (approx. 100) that joinder of all members is impracticable;

(b) That there are questions of law and fact common to the class, including but not limited to:

(i) Whether the defendants ordered a "mass layoff" as that term is defined within the WARN Act which resulted in a "plant closing" as that term is defined within the WARN Act;

(ii) Whether 50 or more full-time employees sustained an "employment loss" as that term is defined within the WARN Act;

(iii) Whether the defendant violated the WARN Act 29 U.S.C. § 2101 *et. seq.* by failing to pay each plaintiff back-pay for sixty (60) days as required by the WARN Act.

(c) That the claims of the plaintiffs are typical of the claims of the class;

(d) That the class which plaintiffs seek to represent are all former employees of Earthgrains, Little Rock, Arkansas plant, who suffered a loss of wages and benefits as a result of the defendant's failure to pay back-pay for sixty (60) days;

(e) That the plaintiffs would be adequate representatives of the class, because;

(i) The plaintiffs are represented by competent, experienced, and vigorous counsel and are able to adequately finance the litigation;

(ii) The interests of the plaintiffs are coextensive with the other members of the class;

(iii) The plaintiffs' interests are not antagonistic in any way to the interests of those they represent;

(iv) There would be adequate numerical representation in this suit.

(f) That the common questions of law and fact to the members of the class predominate over any questions affecting only individual members and that a class action will more efficiently and fairly adjudicate this cause of action.

FACTUAL ALLEGATIONS AND CAUSE OF ACTION—WORKER ADJUSTMENT RETRAINING AND NOTIFICATION ACT 29 U.S.C. § 2101—ET. SEQ. (WARN ACT)

(6) That on December 6, 1995, the defendant notified the bargaining unit representative for its Little Rock, Arkansas employees that it would permanently close its Little Rock, Arkansas facility on Februray 4, 1996.

(7) That by December 31, 1995, the defendant had laid off approximately 100 full-time employees including the named plaintiffs herein.

(8) That the defendant, Earthgrains located in Little Rock, Arkansas, constitutes a single site of employment as that term is defined within the WARN Act.

(9) That the "mass lay off" described resulted in an "employment loss" for more than 50 full-time employees of the defendant, Earthgrains, 29 U.S.C. § 2101 (a)(3) & (6).

(10) That the "mass lay off" described resulted in a "plant closing" of the Little Rock, Arkansas facility as that term is defined within the WARN Act, 29 U.S.C. § 2101 (a)(2).

(11) That the plaintiffs and each and every member of the plaintiff class are "affected employees" within the meaning of the WARN Act, 29 U.S.C. § 2101(a)(5).

(12) That the defendant failed to provide written notice to each affected employee 60 days in advance of the plant closing of the Earthgrains facility located in Little Rock,

Arkansas. Without such notice the defendant violated the provisions of the WARN Act, 29 U.S.C. § 2101 *et. seq.*

(13) That the WARN Act, U.S.C. § 2102 (a) requires that an employer provide each affected employee 60 days advance written notice of any plant closing, as well as requiring notification to the State Dislocated Worker Unit of the plant closing and the chief elected official of the unit of local government where the closing will occur.

(14) That in lieu of a 60 day notification period required by WARN, the defendant paid its affected employees for working days within the required 60 day notification period.

(15) That the WARN Act requires that an employer who fails to provide each aggrieved employee 60 days advance written notice of a plant closing is required to pay each aggrieved employee back pay for each calendar day of the violation at a rate of compensation not less than the higher of the average regular rate received by each affected employee during the last three years of the employees employment or the final regular rate received by each affected employee, 29 U.S.C. § 2104 (a)(4)(A).

(16) That the defendant has failed to pay each named plaintiff and members of the proposed plaintiffs class in accordance with the provisions of WARN, 29 U.S.C. § 2104 (a)(1)(A), by failing to pay each aggrieved employee back pay for each calendar day of the violation, such days totalling 60 in number.

(17) That the defendant, Earthgrains, is directly liable for making the decision which resulted in the permanent closing of the plant in Little Rock, Arkansas.

(18) That pursuant to the WARN Act, 29 U.S.C. § 2104 (a)(3), any employer who violates the provisions of § 2102 of the WARN Act for failure to notify the proper local government official and the State Dislocated

Worker Unit shall be subject to a civil penalty of up to $500 per day for violation up to a maximum of 60 days.

(19) That as a result of the defendant's violation of the WARN Act, the plaintiffs have been injured in amounts equal to their respective lost salaries, wages and benefits that they would have continued to receive for a period of 60 calendar days after the dates of their respective discharges, less any payments made by the defendant. Such lost pay is to be calculated in accordance with 29 U.S.C. § 2104 (a)(1)(A), and is to include all lost benefits.

(20) That as a result of the defendant's violation of the WARN Act, a civil penalty for each day of violation at the rate of $500 per day should be assessed against the defendant.

(21) That plaintiffs, and all others similarly situated, seek from the defendant pre-judgment interest, attorney's fees and all other costs incurred in this cause pursuant to 29 U.S.C. § 2104 (a)(6).

WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated, demand as follows:

(a) That this action be certified as a class action for the benefit of all former employees of Earthgrains, who suffered an employment loss on or about December 31, 1995, and subsequent dates thereafter;

(b) That each named plaintiff, as well as other members of the class similarly situated, be awarded judgment against the defendant, Earthgrains, for back-pay and benefits as provided in the WARN Act, as well as prejudgment interest on the amounts owed;

(c) That a civil penalty be assessed against the defendant at the rate of $500 per day of violation;

(d) That the plaintiffs and members of the class be awarded costs of this cause of action, including attorney's fees against the defendant;

(e) That the plaintiffs and class members receive any and all other relief to which they may be deemed entitled; and,

(f) That, in the alternative, if this action is not certified as a class action that the plaintiffs listed be entitled to proceed on their claims individually and that each be awarded judgment for back-pay, benefits and costs as provided in the WARN Act.

PLAINTIFFS DEMAND A TRIAL BY JURY.

RICHARD BREEDLOVE and NADINE TANNER, Individually, and on behalf of all others similarly situated, *Plaintiffs,*

By /s/ David Fausett
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FILED
AUG 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-77

In The

Supreme Court of the United States

October Term, 1997

RICHARD BREEDLOVE, *et al.*,

Petitioners,

vs.

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eighth Circuit erred in determining that the calculation of back pay under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988), should be based on working days rather than calendar days within the statutory sixty-day notification period.

STATEMENT PURSUANT TO RULE 29.6

Respondent Earthgrains Baking Companies, Inc. has no parent corporation and no nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas granting Respondent Earthgrains Baking Companies, Inc.'s motion to dismiss is reported at 963 F. Supp. 802 (E.D. Ark. 1997), and is reprinted in the appendix to the Petition for Writ of Certiorari at 10a. The judgment of the district court is reprinted in the appendix to the Petition for Writ of Certiorari at 16a. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's judgment is reported at 140 F.3d 797 (8th Cir. 1998), and is reprinted in the appendix to the Petition for Writ of Certiorari at 1a.

STATEMENT OF THE CASE

Petitioners Richard Breedlove and Nadine Tanner ("Petitioners"), on behalf of themselves and similarly situated employees, commenced this action in the United States District Court for the Eastern District of Arkansas against Respondent Earthgrains Baking Companies, Inc. d/b/a Campbell Taggart Baking Company, Inc. ("Earthgrains") on July 17, 1996, pursuant to the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109 (1988). In their complaint, Petitioners alleged that they were former employees of Earthgrains' Little Rock, Arkansas facility whose positions were terminated beginning in December of 1995.[1] They contended that Earthgrains provided them with WARN Act notice on December 6, 1995 that the Little Rock facility would be closed permanently on February 4, 1996 and alleged that by December 31, 1995, Earthgrains had laid off approximately 100 full-time employees in violation of the WARN Act.

1. Earthgrains' statement of facts assumes *arguendo* that all well-pleaded facts of the Petitioners' complaint are true, as it must for purposes of the review of the appellate court's order affirming the dismissal of the complaint. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Petitioners' complaint also admitted that "in lieu of a 60 day notification period required by WARN, the defendant paid its affected employees for working days within the required 60 day notification period." (Complaint, ¶ 14, reprinted in appendix to Petition for Writ of Certiorari [hereinafter Pet. App.] at 17a-32a).

On August 31, 1996, Earthgrains filed a motion to dismiss the complaint on the grounds that Petitioners had failed to state a cause of action. Earthgrains contended that because it had, by Petitioners' own admission in the Complaint, paid its former employees back pay for every working day within the notification period, Petitioners were not entitled to any further recovery under the terms of the statute. On February 10, 1997, the district court granted Earthgrains' motion to dismiss, holding that damages under the WARN Act should be calculated by working days within the notice period, rather than calendar days.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's ruling. The Eighth Circuit agreed with the majority of the federal appellate courts which have previously ruled on the issue in concluding that the measure of damages under the statute should be based on the number of days an employee would have worked during the statutory notice period. *Carpenters District Council of New Orleans v. Dillard*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996).[2]

2. Since the Eighth Circuit issued its ruling in this case, the Court of Appeals for the Ninth Circuit has also agreed with the holdings of *Dillard*, *Saxion*, and *Frymire*, ruling that damages under the WARN Act should be calculated by working days in the notice period, rather than calendar days. *Burns v. Stone Forest Industries, Inc.*, __ F.3d __, 14 IER Cases 193, 1998 WL 388497 (9th Cir. July 14, 1998).

The Eighth Circuit held that the damages provision of the statute was "susceptible to more than one reasonable interpretation," and that the legislative history of the WARN Act made clear that Congress intended the statute to provide back pay only for working days in the notice period. (Pet. App. 6a, 7a-8a). The court concluded, "Congress did not intend to provide employees who did not receive notice more compensation than they would have received had notice been given." (Pet. App. 9a).

REASONS FOR DENYING THE WRIT

Petitioners' assertion that there is confusion in the lower courts about the proper measure of damages to be assessed in WARN Act cases is unsupportable, as is their contention that the rules of statutory construction compel reversal of the Eighth Circuit's ruling on an important question of federal law. In fact, five of the six federal appellate courts ruling on this issue have rejected Petitioners' statutory construction arguments. Quite simply, there is nothing about this case which merits review by this Court, either because of disagreement among the circuit courts of appeals or because an important issue of federal law should be resolved by this Court.

I.

THERE IS LITTLE CONFLICT AMONG THE FEDERAL APPELLATE COURTS ON THE ISSUE OF THE CORRECT MEASURE OF WARN ACT DAMAGES.

Petitioners contend that there exists among the federal courts of appeals a conflict regarding the proper measure of damages under the WARN Act and that the conflict "will continue to foster litigation and cause similarly situated workers to be compensated differently." (Petition for Writ of Certiorari

("Petition") at 5). In fact, of the six federal appellate courts which have considered the appropriate measure of damages under the WARN Act, *five*, including the court below, have held that working days rather than calendar days is the correct way to calculate the back pay due workers under the statute. *Burns v. Stone Forest Industries, Inc.*, __ F.3d __, 1998 WL 388497 (9th Cir. July 14, 1998); *Breedlove et al. v. Earthgrains Baking Companies, Inc.*, 140 F.3d 797 (8th Cir. 1998); *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, __ U.S. __, 116 S. Ct. 1588 (1996); *Carpenters District Council of New Orleans v. Dillard*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Only one appellate court — the Third Circuit in *United Steelworkers of America v. North Star Steel Co.* [hereinafter *North Star Steel*], 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), the first court to consider the issue — has adopted the calendar days approach, and it did so without reference to the legislative history of the WARN Act. Its reasoning, and that of the Petitioners in this case, has been specifically rejected by the federal appellate courts which have subsequently ruled on the issue. Thus, the conflict among the federal appellate courts on the issue is, contrary to Petitioners' contentions, minimal.

Moreover, this Court denied certiorari in both *Dillard* and *North Star Steel* and dismissed certiorari in *Frymire*. If certiorari was inappropriate in those cases, when the split in the circuits was more pronounced because fewer courts had ruled on the issue, it is even more inappropriate now, when the conflict among the circuits has been minimized by the consistent holdings of the federal appellate courts. Petitioners' fear that uncertainty about the issue will continue to "foster litigation" is, therefore, unfounded. Since the Third Circuit's decision in *North Star Steel*, the federal courts of appeals have been unanimous in rejecting the calendar days approach.

The minimal differences among the district courts on the issue has largely been resolved by the consistency of the federal appellate courts' opinions since *North Star Steel*. The federal district courts and bankruptcy courts outside the Third Circuit have almost all applied the working days approach to calculation of damages under the WARN Act. *See Local 1239 v. Allsteel, Inc.*, 1998 WL 299820 (N.D. Ill. June 2, 1998); *Association of Western Pulp and Paper Workers v. Grays Harbor Paper Co.*, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. March 14, 1994); *Breedlove v. Earthgrains Baking Companies, Inc.*, 963 F. Supp. 802 (E.D. Ark. 1997); *Washington v. Aircap Industries, Inc.*, 860 F. Supp. 307 (D.S.C. 1994); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1296 (E.D. Tenn. 1990), *amended in part*, 748 F. Supp. 1276 (E.D. Tenn. 1990); *In re Hanlin Group, Inc.*, 176 B.R. 329 (Bankr. D.N.J. 1995); *In re Riker Industries, Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993). The only exception outside the Third Circuit which has not been overruled by the appellate courts is the district of Massachusetts, which applied a calendar days approach. *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995); *United Electrical, Radio and Machine Workers of America v. Maxim, Inc.*, 115 Lab. Cas. ¶ 10,077, 5 IER Cases 629, 1990 WL 66578 (D. Mass. 1990).[3] Because of the consistency of the federal courts since the *North Star Steel* decision, Petitioners' contention that the lower courts are confused about the issue is meritless.

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3. Of the other lower cases cited in the Petition as utilizing the calendar days method, *Joshlin v. Gannett River States Pub. Corp.*, 840 F. Supp. 660 (E.D. Ark. 1993), has been overruled by the Eighth Circuit's decision in this case; *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993) has been overruled by the Ninth Circuit's decision in *Burns*; and the other cases — *Kalwaytis v. Preferred Meal Systems*, 78 F.3d 117 (3d Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 73 (1996), and *Georgia-Pacific v. Unemployment Board*, 630 A.2d 948 (Pa. Commonwealth Ct. 1993) — are in the Third Circuit. (*See* Petition at 7).

Thus, the granting of certiorari in this case would not, as Petitioners contend, eliminate unnecessary litigation and avoid undue hardships. (Petition at 7). The issue of the correct calculation of WARN Act damages has been thoroughly litigated in the lower courts and there simply is little conflict among the lower courts on the issue.

II.

THE EIGHTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE PURPOSE, PROVISIONS, AND LEGISLATIVE INTENT OF THE WARN ACT.

Petitioners assert that the Eighth Circuit's decision merits review by this Court because, they contend, it ignores the language, purpose and statutory scheme of the WARN Act. Contrary to Petitioners' assertions, however, the Eighth Circuit's decision reflects a better understanding of the language, goals and legislative history of the statute than does Petitioners' argument. The court of appeals did not err in reaching the conclusion that Congress intended to limit WARN Act damages to workers to back pay they would have received had they continued to work during the notice period. Its holding is entirely consistent with the statute's language and with congressional intent. No review of the Eighth Circuit's decision is, therefore, necessary.

The WARN Act is designed to provide employees with sixty days warning of plant closings and mass layoffs. 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a); 134 Cong. Rec. 15,923 (June 24, 1988). A covered employer must notify all employees or their union, as well as the local government, in writing, of its intention to close a plant or engage in a mass layoff sixty days prior to the action. 29 U.S.C. § 2102(a); *see also United Food and Commercial Workers Union Local 751 v. Brown*

Group, Inc., 517 U.S. 544 (1996); *North Star Steel Co. v. Thomas* [hereinafter *Thomas*], 515 U.S. 29, 30 (1995). This advance notice "provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs, and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a) (1994); *see also Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994) (WARN Act "intended to provide employees with notice so that they could adjust to the layoff and locate other work"), *cert. denied*, 513 U.S. 1019 (1994); *Halkias v. General Dynamics Corp.*, 955 F. Supp. 695, 697 (N.D. Tex. 1997) (purpose of WARN Act is "to protect workers, their families and communities by providing notice so that workers who will be terminated may seek other jobs or retraining"), *aff'd*, 137 F.3d 333 (5th Cir. 1998).

An employer who violates the notice provisions may be held liable to the unnotified employees in a civil action for "back pay for each day of the violation," to be computed as not less than the higher of "(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or (ii) the final regular rate received by such employee." 29 U.S.C. § 2104(a)(1). The statute also provides that the amount for which an employer is liable should be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. § 2104(a)(1)(A). Damages may also be reduced by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(1)(B).

Petitioners contend that the purpose of the WARN Act is to "ensure that workers receive timely notice of plant closings" and not to "compensate workers by providing them with

damages in lieu of notice." (Petition at 5). Petitioners argue that the term "back pay" is merely a "label for the method to determine the daily statutory penalty rate" and was intended by Congress to be a penalty to the employer for violation of the WARN Act. (Petition at 6).

Petitioners' interpretation of the term "back pay," however, is contrary to this Court's definition of the term. In *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197 (1941), this Court held that the term "back pay," as used in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*, means "payment . . . of a sum equal to what [an employee] normally would have earned." Like the WARN Act, the NLRA does not expressly limit back pay available for a violation to actual days the employee would have worked during the violation period. 29 U.S.C. § 160(c). In *Phelps*, however, this Court held that the remedy of "back pay" seeks to restore an employee "as nearly as possible, to that which would have [been] obtained but for the [violation]." *Id.* at 194.

In interpreting the use of the same term in the WARN Act, the federal courts of appeals, even the Third Circuit in *North Star Steel*, have recognized that the term "back pay" under traditional labor law denotes a lost earnings concept. *Dillard*, 15 F.3d at 1283; *North Star Steel*, 5 F.3d at 42-43; *Saxion*, 86 F.3d at 553. For example, the *Dillard* court stated that back pay:

> commonly means pay, i.e., wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred.

15 F.3d at 1283. The court in *Saxion* stated that:

> the term "back pay" connotes a remedy that would require the payment of a sum such that the employees would be put in the same position they would have been had the violation never occurred.

86 F.3d at 553. *See also Washington*, 860 F. Supp. at 310 ("the term 'back pay' commonly means the wages or benefits that the employee would have earned if the violation had not occurred").

This Court has held that in the absence of contrary indication, the courts must assume that when a statute uses a term with a fixed, technical meaning, Congress intended it to have its established interpretation. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991); *see also Morissette v. United States*, 342 U.S. 246 (1952); *Gilbert v. United States*, 370 U.S. 650 (1962). Moreover, Congress is presumed to know the legal background of the area it is legislating. *Downer v. United States*, 97 F.3d 999, 1004 n.3 (8th Cir. 1996).

The Eighth Circuit applied these principles in concluding that the term "back pay" was not merely, as Petitioners argue, a label to identify how damages should be calculated. According to the settled rules of statutory construction set forth by this Court, the Eighth Circuit presumed that when Congress used the term "back pay" in the WARN Act, it was aware of the judicial construction of the term as denoting a lost earnings concept. In fact, the legislative history of the WARN Act supports the presumption that Congress not only knew the meaning of the term "back pay," but that it intended that term to be used as it traditionally had been interpreted under federal labor law. When legislators first introduced two bills mandating advance notice of closings or mass layoff in 1987, critics of the proposed legislation argued that it would adversely affect court decisions relating to the NLRA. Susser, *Election-Year Politics*

and the Enactment of Federal "Plant-Closing" Legislation, 14 Employee Relations L.J. 349, 350 (1988). In later debate concerning the revised proposed legislation — the WARN Act — Senator Metzenbaum, the bill's sponsor, specifically stated that the purpose of the WARN Act was *not* to change existing labor laws or their interpretation:

> This bill has no effect on existing court interpretations of the National Labor Relations Act, nor should it have any effect, whatsoever, on future court decisions relating to the balance of rights under traditional labor law.

134 Cong. Rec. S8598-01 (daily ed. June 27, 1988) (statement of Sen. Metzenbaum).[4] *See also* 134 Cong. Rec. S8614-03 (daily ed. June 27, 1988) (statement of Sen. Metzenbaum) ("I want to say as strongly as I can that we have no intention of affecting the basic labor law.").

Petitioners' dismissal of the term "back pay" as simply a "label," resulting in no ambiguity in the terms of the statute is, consequently, unsupportable. Petitioners have presented no evidence of legislative intent that would counter the presumption that Congress used the term "back pay" to denote the construction courts have traditionally used, because the legislative intent is clearly to the contrary. In addition, Petitioners' argument that the term "back pay" does not connote lost earnings would, in effect, write the term out of the statute without any legislative basis for such a result. *See Dillard*, 15

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4. Senator Metzenbaum made this statement in response to the charge that the WARN Act would upset the balance of union/management rights established by the NLRA and its judicial interpretations by requiring employers to give striking workers sixty days notice of the employers' intention to hire permanent replacements. 134 Cong. Rec. S8589-01 (daily ed. June 27, 1988) (statements of Sens. Hatch, Metzenbaum).

F.3d at 1283-84 n.14; *Saxion*, 86 F.3d at 560. Petitioners thus seek to have this Court in effect nullify a portion of the statute. Such an interpretation is contrary to this Court's admonition in *Estate of Cowert v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) that "courts must give effect to the clear meaning of the statute as written."

Because of the ambiguity created by the use of the term "back pay" in the damages provision of the statute, the Eighth Circuit turned to the legislative history of the WARN Act to determine congressional intent with respect to the issue of damages, just as the courts in *Dillard*, *Saxion* and *Frymire* did. (Pet. App. 6a). And, as did the *Dillard*, *Saxion* and *Frymire* courts, the Eighth Circuit found Congress' intent expressly stated in Senate Report No. 62:

> [F]or violations of the notice provisions, *damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period*, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong. 1st Sess. 24 (1987) (emphasis added). The Senate Report sets forth as clearly and concisely as possible Congress' intent with respect to damages available under the WARN Act — those the employee would have received had no violation occurred. It clearly contemplates that the damages provisions are remedial in nature, are tied to the concept of lost earnings and are to be measured in terms of working days rather than calendar days.

The Senate Report, however, is not the only expression of legislative intent with respect to the damage provisions of the statute. The legislative history of the WARN Act is also replete with other references confirming that the working days calculation of damages was the one intended by the legislature. In debating the proposed amendment of Senator Quayle that employers could provide severance pay instead of notice, Senator Metzenbaum, one of the bill's sponsors, stated that, without the Quayle amendment, the bill provided that "if the notice is not given then *there is an obligation to make up the salary.*" 134 Cong. Rec. S8536-01 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum) (emphasis added). Senator Metzenbaum's statement clearly indicates that the purpose of the damages provision of the statute was to "make up" the wages the employee would have received had notice been properly given, that is, to provide the aggrieved employees with wages they would have earned absent a statutory violation. Such a concept is identical to that of lost earnings or back pay. The legislative history also makes clear that the damages provisions were not intended to impose significant financial burdens on employers. In discussing Senator Quayle's proposed amendment to provide for severance pay in lieu of notice, Senator Metzenbaum stated:

> The fact is we do provide that if the notice is not given then there is an obligation to make up the salary, but we do not want anybody to think that this bill is a way of providing additional financial obligations on the part of employers.

134 Cong. Rec. S8536-01 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum). He also stated, "We are not asking to place an additional financial burden on the employers of this country." *Id.* In addition, in discussing the bill, the members of Congress repeatedly referred to the damages available for a

violation of the notice provisions as "back pay." 134 Cong. Rec. H5500-01 (daily ed. July 13, 1988) (statement of Rep. Fawell); 134 Cong. Rec. H5500-01 (daily ed. July 13, 1988) (statement of Rep. Bereuter); 134 Cong. Rec. S8536-01 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum).

In the court below, Petitioners could point to *no* legislative history that supported their interpretation of the damage provision of the statute. As they do in this Court, they simply relied on other ambiguous language in the legislative history which mirrors the ambiguity of the statute. For example, in the Eighth Circuit and in their Petition, Petitioners cite a conference report which states that "for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff. . . ." H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. (1988) at 1052-53. (Petition at 18). Petitioners do not illustrate how this language is any clearer than the language of the statute itself. On the other hand, the Senate Report relied upon by the Eighth Circuit below, as well as the Fifth, Sixth and Tenth Circuits, clearly shows that congressional intent was to limit damages to the traditional concept of back pay — i.e., wages the employee would have earned had he continued to work during the notice period.

Petitioners next argue that the Eighth Circuit's interpretation of the phrase "back pay for each day of the violation" eviscerates the "fundamental goal" of the Act because, under that calculation, "there is no penalty for non-compliance and no incentive to comply" with the notice provisions of the Act. (Petition at 9). Petitioners also contend that the working days interpretation of the damages provision is inconsistent with the fact that damages are meant to be "penalties," relying on dicta in this Court's opinion in *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995).

Petitioners' arguments, however, misconstrue this Court's holding in *Thomas*. In *Thomas*, this Court held that the lower courts should apply state rather than federal statutes of limitations to WARN Act claims. *Id.* Prior to reaching the issue of the appropriate limitations period, the Court discussed the general provisions of the WARN Act. After discussing the notice provisions, the Court stated, "An employer who violates the notice provisions is liable for penalties by way of a civil action. . . ." *Id.* at 31. The clear intent of this Court's statement is that the "penalty" to which it was referring was the "civil action." It did not, contrary to Petitioners' assertions, characterize damages as "penalties"; instead, it characterized "civil actions" as penalties. This Court in *Thomas* did not discuss the issue of damages at all and never characterized the WARN Act as penal in nature.

Moreover, as the district court in *Allsteel* noted, the contention that an employer suffers no adverse consequences for failure to comply with the notice provisions of the WARN Act is "simply wrong." 1998 WL 299820 at *4. As the *Allsteel* court noted, "Employers have an incentive to comply with the WARN Act because they do risk a loss: paying wages to employees but not receiving the benefits of their labor." *Id.* Employers also risk paying civil penalties to local governments for failure to provide adequate notice and payment of attorneys fees and prejudgment interest if a lawsuit is successfully brought by its former employees. 29 U.S.C. § 2104. Thus, contrary to Petitioners' contentions, there is ample incentive for an employer to comply with the statute, even when damages are limited to working days within the notice period.

Petitioners further argue that the goal of the WARN Act — to provide displaced workers with training and readjustment — would be frustrated if they are paid only for the days they would have worked in the notice period. (Petition at 9). Petitioners contend, "The utility of having the plant as a place for workers facing a

common difficulty to congregate and address its solution is what makes advance notice critical," and:

> The concern is that if the workers disperse when they are laid off, few will become involved in worker adjustment programs, whereas two months notice *prior to closing* provides a geographical locus for near-universal participation.

(Petition at 9) (emphasis in original).

Awarding employees damages for each day they would have worked during the notice period, however, does not prohibit employees from receiving a full opportunity to engage in retraining and to seek reemployment. As the court noted in *Allsteel*:

> If employees receive proper notice of a plant closing, they are not entitled to any unearned pay, and have to seek retraining or re-employment on their off-hours. Under the work days approach, the employees are in no way deprived of an opportunity to access training and seek re-employment when proper notice is not given, because they receive compensation for days they would have worked but did not. Indeed, their opportunities are enhanced by having the day-time hours available for job seeking and retraining.

1998 WL 299820 at *5. The Ninth Circuit in *Burns* reached a similar conclusion:

> Another reason why the work days approach makes more sense is that the calendar days construction would put financial pressure on the company to

> reduce expense in a way that would hamper the workers' opportunities to search for new jobs. The company in this and any case could avoid liability by requiring the workers to come in every work day during the 60-day notice period, and tell them to sit and waste time in a plant that produced nothing. But if the company closes the plant and tells the workers to come in for their paychecks and otherwise feel free to look for work, retrain, or do as they like during the 60-day period, then under the workers' theory in this case, it has to pay them for weekends and holidays. . . . Congress was trying to make a shutdown less painful for the workers, yet the construction urged by the workers and the amici in this case would make a shutdown more painful, by discouraging employers from letting workers use the 60-day notice period to search for new jobs.

1998 WL 388497 at *3.

Petitioners also rely on the enforcement provision of the WARN Act as it relates to local governments as proof that the statute's damages provision operates as a penalty to employers. (Petition at 11-12). That provision states:

> Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

29 U.S.C. § 2104(a)(4). Petitioners argue that the conference report applies a calculation of the $500-a-day civil penalty for violations of the act for each *calendar* day within the notice period and that damages for aggrieved employees should be calculated in the same way. (Petition at 12). The penalties applied to actions brought by local governments, however, are not available to allegedly aggrieved employees, whose recovery is specifically limited to "back pay for each day of the violation." 29 U.S.C. § 2104(a)(1). The statute provides that "[t]he remedies provided for in this section shall be the exclusive remedies for any violation of this chapter." 29 U.S.C. § 2104(b). With respect to the *civil penalty* provision of the statute, because such a penalty accrues only to a local government, damages cannot be measured in terms of working days within the notice period and thus a calendar day approach is the only one possible. With respect to the "back pay" allegedly due employees, however, the working day calculation is not only possible but was unequivocally the calculation intended by Congress. Thus, the penalty provision with respect to local governments is neither applicable nor relevant to the calculation of back pay under the damages provision available to aggrieved employees.

Petitioners' contentions also ignore the plain language of the Senate Report that, with respect to the *damages* aspects of the statute, the back pay provision was designed to provide the employee with "the wages . . . the employee would have received had the plant remained open or the layoff been deferred until the conclusion of the notice period." S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987). This was the amount that Congress specifically stated was "designed to penalize the wrongdoing employer" and "deter future violations," and not any other amount in excess of lost earnings, as Petitioners argue.

The congressional intent apparent in the Senate Report utterly refutes Petitioners' argument that the term "back pay" as used in the WARN Act does not connote lost earnings. Indeed, rather than there being clear congressional intent to interpret the term differently than courts have traditionally construed it, the Senate Report and remarks of Senator Metzenbaum demonstrate clear congressional expression that the term back pay as used in the WARN Act is intended to mean exactly what it has always meant in labor law — wages an employee would have earned without a statutory violation. Use of the working days approach rather than the calendar days approach best comports with this congressional desire to award "back pay" because it enables employees to receive the wages and benefits they would have received had the violation not occurred. On the other hand, calculation of damages based on the calendar days within the notice period would be inconsistent with congressional intent because employees would receive more than they would had they continued to work.

III.

THE CALENDAR DAYS APPROACH WOULD LEAD TO INCONSISTENT AND ANOMALOUS RESULTS.

The Eighth Circuit correctly noted that application of Petitioners' interpretation of the damage provision of the WARN Act would lead to anomalous results which are inherently inequitable to the employees the WARN Act was designed to protect. (Pet. App. 7a). *See also Dillard*, 15 F.3d at 1284; *Saxion*, 86 F.3d at 559; *Burns*, __ F.3d __, 1998 WL 388497 at *3. The example set forth by the court in *Dillard* and reiterated by the Eighth Circuit of the absurd result engendered by a calendar days approach was a hypothetical comparing the damages which would be awarded to employees working different hours

during the notice period. 15 F.3d at 1285.[5] Under the calendar days approach to calculation of damages, a full time employee who works ten hours a day, four days a week would be entitled to 600 hours worth of pay (ten hours times sixty days) for a violation of the WARN Act. Another employee who works eight hours a day, five days a week — the same amount per week as the first employee — would only be entitled to 480 hours of pay (eight hours times sixty days) for the same violation. A part time employee who works only ten hours a day, one day a week would also be entitled to 600 hours of pay (ten hours times sixty days), 120 hours **more** than that awarded to the full time employee. *See Dillard*, 15 F.3d at 1285. As the court in *Dillard* noted,

> Under this calendar-day system, not only is the employer severely penalized for choosing to pay damages in lieu of notice, but the full-time employee is treated inequitably, and the part-time employee gets a windfall.

Id.

On the other hand, under the working days calculation method, "such bizarre results do not occur" and damages are fairly allocated. *Dillard*, 15 F.3d at 1285. The full time employee working ten hours a day would receive the same amount as the full time employee working eight hours a day, because the number of days he or she would have worked is included in the calculation. The part time employee, who would have worked only once a week during the sixty-day period would **not** receive more in damages than the full time employee. The

5. This hypothetical situation was first raised in *North Star Steel*, but was rejected by the Third Circuit because the situation was purely hypothetical and because it was unwilling to discuss the method of calculating damages under §§ 2104(a)(1)(A)(i) and (ii). *North Star Steel*, 5 F.3d at 43.

working days calculation is, therefore, as the *Dillard* court stated, "a plain-sense result in a day and time when it is common to find employees with work schedules that vary from the traditional eight-hour day, forty-hour work week." *Id. See also Washington*, 860 F. Supp. at 312 ("If wages are calculated based on a work-day approach, then such inequities would not occur").

Petitioners argue that these inequitable results would not occur under a calendar days approach if courts measure damages based on the calculation of overtime rates under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. (Petition at 16). Petitioners assert that the term "regular rate" as it is used in the WARN Act:

> is derived from the Fair Labor Standards Act . . . , 29 U.S.C. § 207(o)(4), which requires that damages be determined by taking into account "total renumeration for employment," and dividing it by the number of hours a week the employee actually worked.

(Petition at 16). Petitioners, however, offer no authority for the proposition that the term "regular rate" in the WARN Act is derived from the FLSA, nor that the method for calculating overtime rates under the FLSA is the method to be used to calculate back pay under the WARN Act. The definition of "regular rate" is contained in neither the WARN Act nor its regulations and neither the WARN Act nor its regulations contain any reference to calculation of damages under the FLSA overtime rates. *See* 29 U.S.C. §§ 2104(a)(1)(A)(i), (ii); 20 C.F.R. § 639.1 *et seq.*

Moreover, Petitioners' suggestion that the FLSA regulations calculate the "regular rate" as a daily average over

a five-day week is erroneous. The FLSA's regulations specifically state that "[t]he 'regular rate' under the Act is a rate *per hour*." 29 C.F.R. §§ 108, 109 (emphasis added). The hourly rate is calculated by dividing a worker's weekly non-overtime pay by the number of hours the employee worked in that week. 29 C.F.R. § 778.109. As the Ninth Circuit noted in *Burns* when rejecting a similar argument, "Nothing in this definition suggests that the number of hours worked per week should be divided by the number of days in the work week to reach a per-day average." 1998 WL 299820 at *5 n.1.

The language of the WARN Act clearly contemplates calculation by *days* and not by *weeks*: an employer is liable for "back pay for each *day* of the violation. . . ." 29 U.S.C. § 2104(a)(1)(A) (emphasis added). In fact, there is nothing in the statute which demonstrates that the rate should be calculated by the week; the only time period mentioned anywhere in the statute or regulations is a "day." *See Burns*, 1998 WL 299820 at *5. Nor have the courts calculated WARN Act damages with reference to the overtime "regular rate" calculation of the FLSA. *See, e.g., Washington*, 860 F. Supp. at 312 (damages calculated by multiplying hourly rate by eight hours by the number of working days in the notice period without reference to FLSA). In *Dillard*, the Fifth Circuit noted that "the precise method of calculation raises many questions." 15 F.3d at 1285 n.15. It also stated:

> It is clear, however, that those provisions require the calculation of damages based on the daily amount an employee earns, and regardless on how the amount of daily damages is reached, North Star Steel's hypothetical situation illustrates the anomalous results that emanate from the calendar days approach.

Id.

There is absolutely nothing in the WARN Act or its legislative history which would justify the anomalous and inequitable damages awarded under the method of calculation advocated by Petitioners. Even if the statute were designed as a penalty for employers, it was clearly not designed to penalize workers in this way. Nor was is designed to provide some workers with windfalls, while others are treated inequitably. *See Dillard*, 15 F.3d at 1295-96. As the court in *Washington* stated:

> The only reasonable interpretation of the damages provision is that damages should be calculated using the number of work days within the violation period. This interpretation is also the most equitable since it would put the employee back in the same position he or she would have been in had he or she been given notice of the closing.

Petitioners' complaints with the Eighth Circuit's decision amount to nothing more than their disagreement with the fact that the court of appeals did not ignore the plain language of the WARN Act, the judicial interpretation of the term "back pay," the statute's legislative history or common sense. To reach the conclusion advocated by Petitioners in this case, the Eighth Circuit would have violated well-established rules of statutory construction and applied an interpretation which is contrary to congressional intent. The Eighth's holding, like those of the courts in *Dillard*, *Saxion*, *Frymire* and *Burns*, was not incorrect nor did it touch upon an important questions of federal law which should be resolved by this Court. Because there is only minimal conflict among the circuits on this issue, no significant federal question which should be settled by this Court and because the Eighth Circuit's decision did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, certiorari should be denied.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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